

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION**

DOCKET NO. 3:08-cv-251-FDW

JAMES M. HARRINGTON,

Plaintiff,

vs.

CIBA VISION CORPORATION,

Defendant.

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ORDER

THIS MATTER comes now before the Court upon Defendants Motion for Certificate of Appealability (Doc. No. 50). Defendant's Motion is DENIED.

Pursuant to 28 U.S.C. § 1292(b), a district judge may certify an order otherwise not appealable for immediate appeal when he is of the opinion that (1) the order involves a controlling question of law, (2) as to which there is substantial ground for difference of opinion, and (3) an immediate appeal may materially advance the ultimate termination of the litigation. The district court has "great flexibility" in determining whether the movant has demonstrated the "exceptional circumstances" justifying a departure from the final judgment policy. Howes v. W.R. Peele, Sr. Trust, 889 F. Supp. 849, 852-53 (E.D.N.C. 1995).

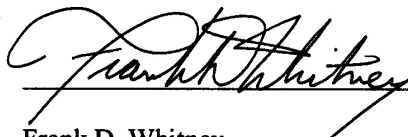
Having reviewed its Order of May 22, 2009, and the parties' memoranda, the Court is of the opinion that immediate appeal would not materially advance the ultimate termination of this case. Plaintiff filed his Complaint on June 3, 2008. Over a year has past, during which time the parties, the United States government, and the Court have spent hundreds of hours, spanning several layers

of briefing and two lengthy oral arguments, resolving the jurisdictional and constitutional issues that Defendant legitimately raised. All issues were meticulously examined. The Court then resolved those issues, denying Defendant's Motion to Dismiss, and ordered Defendant to answer Plaintiff's Complaint and proceed to discovery. Thus, while Defendant is no doubt correct that the issues it raises are controlling questions of law as to which there is substantial ground for difference of opinion, the Court does not believe that immediate appeal would materially advance this litigation. To the contrary, the Court believes that the parties and the judicial system will be better served by proceeding to discovery, summary judgment, and, if necessary, trial. Then, at the conclusion of the case, should Defendant wish to appeal the Court's decision it will be able to present the appellate court with a fully developed record along with all the potentially appealable issues, both legal and factual.

For the reasons stated herein, Defendant's Motion for Certificate of Appealability is DENIED.

IT IS SO ORDERED.

Signed: June 17, 2009



Frank D. Whitney
United States District Judge

